

WISCONSIN'S CONSTITUTIONAL AMENDMENT HABIT: A DISEASE OR A CURE?

JOSEPH A. RANNEY*

I. INTRODUCTION

Although the potential value of state constitutions as “a mine of instruction for the natural history of democratic communities” was recognized more than a century ago,¹ serious drilling into the mine began only recently.² Jurists have debated the proper ideal for American constitutions. Should they be concise, unchanging documents that embody only the most fundamental principles of government, or should they be faithful mirrors of social change that are only modestly more difficult to amend than statutes?³

The ideal of concise, unchanging constitutions has proven unattainable, but American states differ greatly in the number of constitutions they have adopted and the rate at which they have amended such constitutions. Different models appear to have worked well for different states. Donald Lutz has suggested that a successful constitutional system might be defined as one which features “a

* B.A., University of Chicago; J.D., Yale Law School; Adjunct Professor, Marquette University Law School; Attorney, DeWitt Ross & Stevens S.C., Madison, Wisconsin.

1. CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 3 (G. Alan Tarr ed., 1996) [hereinafter CONSTITUTIONAL POLITICS IN THE STATES] (quoting 1 JAMES BRYCE, THE AMERICAN COMMONWEALTH 434 (2d rev. ed. 1981)).

2. *See id.* *See generally* STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY (G. Alan Tarr & Robert F. Williams eds., 2006).

3. *See* CONSTITUTIONAL POLITICS IN THE STATES, *supra* note 1, at xv; Donald S. Lutz, *Patterns in the Amending of American State Constitutions*, in CONSTITUTIONAL POLITICS IN THE STATES, *supra* note 1, at 24–30; STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, *supra* note 2, at 1–8; McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 415 (1819) (referring to a “constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs”). *Cf.* THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 34 (1868) (“How far the constitution of a State shall descend into the particulars of government is a question of policy addressed to the convention which forms it.”).

constitution of considerable age” with a “moderate amendment rate—one that is to be expected in the face of inevitable change,” but he has prudently refrained from anointing any particular model of change as the most desirable.⁴

Wisconsin meets Lutz’s criteria for a successful constitutional system. Wisconsin has retained its original 1848 constitution, which is the oldest state constitution outside New England. Wisconsin has amended its constitution 145 times in 158 years, a frequency that may sound high at first blush but in fact is lower than that of most states.⁵ Nevertheless, recently there have been rumblings of discontent. Critics have suggested that Wisconsin’s constitution contains too many obsolete provisions and that it has been used too much in recent years as a vessel for contemporary social agendas.⁶

The history of Wisconsin’s constitution provides useful clues as to whether the constitution has been successful, how the success of constitutional systems should be measured, and whether it is time for a new constitution in Wisconsin. This Article approaches such questions from several angles. First, it examines the 1848 constitution’s genesis and evolution. The constitution’s birth gave rise to a tradition of constitutional caution. Wisconsin voters rejected the first attempt at a constitution in 1846 because it contained many controversial reform provisions; the 1847–1848 constitutional convention took heed and left such issues to the legislature.⁷ Legal historians have identified several waves of American state constitutional reform, including widespread limits on state subsidy of internal improvements in the mid-nineteenth century, regulation of railroads and corporations in the late nineteenth century, and Progressive-era reform of governmental and tax structures

4. Lutz, *supra* note 3, at 29.

5. See WIS. LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN 2005–2006 BLUE BOOK 235–40 (2005) [hereinafter 2005–2006 WISCONSIN BLUE BOOK]; *infra* text accompanying notes 149, 161; see also Lutz, *supra* note 3, at 32–34 (showing that Wisconsin’s amendment rate is lower than that of 28 other states).

6. See, e.g., Marquette Univ. Law School, Wisconsin Constitution Conference – Some Arguments for a New Wisconsin Constitution, <http://law.marquette.edu/cgi-bin/site.pl?alumni/for> (last visited Mar. 1, 2007); Marquette Univ. Law School, Wisconsin Constitution Conference – Some Arguments Against a New Wisconsin Constitution, <http://law.marquette.edu/cgi-bin/site.pl?alumni/against> (last visited Mar. 1, 2007).

7. JOSEPH A. RANNEY, TRUSTING NOTHING TO PROVIDENCE: A HISTORY OF WISCONSIN’S LEGAL SYSTEM 49–65 (1999); Journal and Debates of the Constitutional Convention 1847–1848 (December 16, 1847), *reprinted in* THE ATTAINMENT OF STATEHOOD, at 179 (Milo M. Quaife ed., 1928).

in the early twentieth century.⁸ Wisconsin joined in these constitutional movements but did so more cautiously than many of its sister states.⁹

The Article then examines Wisconsin's constitutional amendments since 1848 in the aggregate. Scholars have traditionally classified constitutional amendments into several basic categories, including bills of rights; suffrage; organization of the legislative, executive and judicial branches of government; and local government powers.¹⁰ Two additional categories, taxation and gambling, have played an important part in Wisconsin constitutional history.¹¹ The Article discusses differences of historical timing between these categories. Several categories have been a regular subject of constitutional amendment since statehood, but significant numbers of amendments did not occur in other categories until the late twentieth century.

Another classification, not previously identified by scholars, proves surprisingly informative: "housekeeping" measures, that is, details of government which would today be identified as primarily administrative, contrasted with more substantive measures. Early examples of housekeeping measures include the setting of gubernatorial and legislative salaries and the terms of office of sheriffs and other local officeholders.¹² Wisconsin voters have frequently rejected housekeeping amendments, which suggests that such matters are better left to the legislature.¹³ However, it is difficult to draw a bright line between housekeeping and substantive amendments: one must bear in mind that some measures considered administrative today may have seemed substantive to Wisconsin's founders, who acted in an era when government was smaller and more intimate than it is now, and substantive and administrative aspects of government were not generally thought of as separate.

Next, the Article examines the rates at which Wisconsin voters have rejected amendments over the years.¹⁴ Prior to 1900, voters rejected relatively few amendments. Surprisingly, although Wisconsin was a leader in the Progressive reform movement between 1900 and 1920, it

8. CONSTITUTIONAL POLITICS IN THE STATES, *supra* note 1, at 4–16.

9. *See generally infra* Part II.

10. COOLEY, *supra* note 3, at 34–35; Lutz, *supra* note 3, at 36.

11. *See infra* text accompanying notes 131–135, 179–81.

12. *See infra* text accompanying notes 39, 86–88.

13. *See infra* text accompanying notes 39, 86–88.

14. *See infra* text accompanying notes 182–86. Proposed amendments must be passed by the legislature at two consecutive sessions and then ratified by the voters in order to take effect. WIS. CONST. of 1848 art. XII, § 1.

rejected many Progressive-inspired amendments and the overall amendment rejection rate rose dramatically during the Progressive era.¹⁵ Rejection rates fell thereafter and remained relatively low until the 1990s, when reformers again chose to pursue social change through the constitution.¹⁶

The Article concludes by considering from a historical perspective the question: Is Wisconsin's constitution sound, and if it is to be changed, how should it be changed? The 1847–1848 convention was wise not to enshrine controversial social reforms in the constitution. If it had done so, the 1848 constitution's life might well have been short. But three points of weakness stand out in the constitution: the housekeeping clauses and the internal improvement and uniform taxation clauses.¹⁷ Many of the housekeeping clauses were considered points of substantive importance in 1848, and the issues of internal improvement subsidies and taxation were considered so fundamental that the convention's decision to elevate them to the constitutional level is understandable.¹⁸ Nevertheless, they have accounted for a large proportion of proposed amendments to the constitution ever since statehood. Any new convention would do well to consider pruning all housekeeping measures from the constitution and leaving all internal improvements and taxation issues to the legislature's discretion, subject to limits now well enshrined in Wisconsin case law.¹⁹ Reformers should also check any impulse to place controversial social reforms in the constitution and should consider making the constitutional amendment process more rigorous.²⁰

II. A SHORT HISTORY OF WISCONSIN'S CONSTITUTION

A. *The 1846 and 1847–1848 Conventions: A Cautionary Lesson*

Wisconsin held its first constitutional convention in 1846, in the middle of an era of legal and social ferment. Reform movements abounded in America, spurred partly by the ideals of popular democracy espoused by Andrew Jackson's supporters and partly by a felt need to shape American law to accommodate western expansion

15. See *infra* text accompanying note 183.

16. See *infra* text accompanying notes 183 and 187–95.

17. See *infra* text accompanying notes 201–09.

18. See *infra* text accompanying notes 204–09.

19. See *infra* text accompanying notes 210–17.

20. See *infra* text accompanying notes 218–20.

and an increasingly commercial and industrial society. Jacksonians, who generally viewed banks as instruments of centralization and autocracy, contested with Whigs who believed banks were essential if America was to enter the modern economic age.²¹ In some states, reformers pressed for government subsidies of railroads and other private companies in order to foster internal improvements; in other states, where subsidy policies had resulted in crushing debt, reformers supported legal limits on subsidies.²² Other reformers advocated for homestead exemptions providing increased security from the risks associated with creating new business ventures and settling new lands; laws giving married women greater control over the property they brought to their marriages; and popular election of a greater number of state officials, including judges.²³

Each of these movements found a voice in Wisconsin's 1846 convention, which was dominated by liberal Jacksonian "Barnburners."²⁴ The convention devoted much of its time to the bank issue: the Barnburners, led by future chief justice Edward Ryan, secured passage of a provision forbidding all banking business in the new state and requiring a phase-out of paper currency in favor of specie.²⁵ Despite pleas of more conservative Jacksonians to "let not the avenue of escape be sealed" and some hesitation even among Barnburners to enshrine such policy in the constitution, the provision survived reconsideration.²⁶ The convention also placed a married women's property rights clause and a clause mandating homestead exemptions in the constitution, as well as provisions for popular election of judges and a grant of suffrage to aliens who had declared their intention to become

21. See ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 76–80, 134–37, 334–39 (1945); RANNEY, *supra* note 7, at 42–46.

22. CARTER M. GOODRICH, *GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS, 1800–1900*, at 208–55 (1960); see *Journal and Debates of the Convention* (Oct. 12, 1846), *reprinted in*, *THE CONVENTION OF 1846* at 90–91 (Milo M. Quaife, ed., 1919).

23. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 185–86, 214–15 (1973); Richard H. Chused, *Married Women's Property Law: 1800–1850*, 71 *GEO. L.J.* 1359, 1423–25 (1983); Lena London, *Homestead Exemption in the Wisconsin Constitution*, *WIS. MAG. HIST.*, Dec. 1948, at 176.

24. RANNEY, *supra* note 7, at 49–50; Ray A. Brown, *The Making of the Wisconsin Constitution*, 1949 *WIS. L. REV.* 648, 656–59.

25. *Journal of the Convention* (Oct. 9, 1846), *reprinted in* *THE CONVENTION OF 1846*, *supra* note 22, at 70–71; *Speech of Mr. Noggle*, *DEMOCRAT* (Madison, Wis.), Oct. 31, 1846, *reprinted in* *THE CONVENTION OF 1846*, *supra* note 22, at 107–14.

26. *Remarks of Mr. Beall*, *ARGUS* (Madison, Wis.), Nov. 10, 1846, *reprinted in* *THE CONVENTION OF 1846*, *supra* note 22, at 123, 127.

citizens.²⁷ But by the convention's end, many delegates were worried that they had elevated too many reforms to a constitutional level and that the controversy surrounding the reform clauses might doom the constitution to defeat. Their pessimism proved justified: in early 1847, Wisconsin voters decisively rejected the constitution.²⁸

Delegates to a new convention called in the fall of 1847 quickly demonstrated that they had learned from their predecessors' mistakes. Byron Kilbourn, the convention chairperson, commented that but for the banking, married women's, and homestead provisions, "in his opinion the old constitution would have been very generally acceptable. Coupled as they had been together, however, both good and bad, and incapable of separation, the whole had been lost."²⁹ Barnburners and conservatives now agreed that socially controversial matters should be left to the legislature. The convention provided for a referendum on whether a general banking law should be passed and specified that if the voters approved such a law, the legislature would fill in the details.³⁰ The revised draft constitution enjoined the legislature to enact "wholesome" homestead exemption laws but prescribed no details; it omitted any reference to married women's rights.³¹ The voters approved the new constitution by a large margin, and Wisconsin became a state in May 1848.³²

Ironically, the process for amending the constitution itself attracted little attention and generated little debate in either convention. The 1846 convention committee charged with formulating an amendment process recommended that approval of two-thirds of each legislative chamber, together with popular ratification, be required for passage of an amendment, and that the question of holding a new constitutional convention be submitted to the people once every ten years.³³ The convention rejected a proposal to require passage by two consecutive

27. RANNEY, *supra* note 7, at 53–59; Journal and Debates of the Convention, *reprinted in* THE CONVENTION OF 1846, *supra* note 22, at 70–71, 103–14, 218–20, 229–35, 246–47, 252–65, 631–32, 654–55, 660–69.

28. RANNEY, *supra* note 7, at 60–61; ALFONS J. BEITZINGER, EDWARD G. RYAN: LION OF THE LAW 22–24 (1960).

29. Journal and Debates of the Constitutional Convention of 1847–1848, *supra* note 7, at 179.

30. *Id.* at 548–49; WIS. CONST. of 1848 art. XI, § 1.

31. WIS. CONST. art. I, § 17; RANNEY, *supra* note 7, at 64–65; Journal and Debates of the Constitutional Convention of 1847–1848, *supra* note 7, at 179, 284–86, 290, 295, 759–64, 797.

32. *Introduction*, in THE ATTAINMENT OF STATEHOOD, *supra* note 7, at vii–viii.

33. Journal of the Convention (Oct. 19, 1846), *reprinted in* THE CONVENTION OF 1846, *supra* note 22, at 191–92.

legislatures and adopted the committee's proposal with no significant changes.³⁴ The 1847–1848 convention eliminated the two-thirds vote requirement but reinstated the requirement for passage by two consecutive legislatures; it left the matter of future conventions to the legislature's discretion.³⁵ As the *Prairie du Chien Patriot* explained, the 1846 and 1847–1848 conventions reflected prevailing sentiment that the amendment process should be made relatively difficult:

[T]he constitution is a fundamental law and should not be subject to frequent changes. . . . Thus we see that fundamental changes are placed beyond the reach of any sudden ebullition of feeling, prompted by whatever motive; and the deliberate action of both legislature and people is required to effect a change so important.³⁶

B. Amendments, 1848–1900: The Perils of Housekeeping

The ideal of a largely inviolate constitution remained strong in Wisconsin throughout most of the nineteenth century. Relatively few amendments were proposed, and most of those involved housekeeping amendments rather than substantive policies. For example, during the 1850s—a period that witnessed major controversies over the balance of power between Wisconsin's branches of government and over the extent to which the state should subsidize private enterprise, give relief to debtors, and enforce unpopular federal fugitive slave laws³⁷—only three amendments were proposed, all of which dealt with legislative terms of office and all of which were rejected.³⁸ The 1848 constitution specified the salaries of the governor, lieutenant governor and legislators, and all four amendments submitted to the voters in the 1860s were proposals for salary increases.³⁹ A major theme of the 1870s was proposals to

34. *See id.* at 350.

35. Journal and Debates of the Constitutional Convention of 1847–1848, *supra* note 7, at 320, 595, 733–34; WIS. CONST. art. XII, §§ 1–2.

36. Selections from the *Prairie du Chien Patriot*, Feb. 15, 1848, *reprinted in* THE ATTAINMENT OF STATEHOOD, *supra* note 7, at 114.

37. RANNEY, *supra* note 7, at 71–107; *see State ex rel. Bashford v. Barstow*, 4 Wis. 567 (1855); *Bushnell v. Beloit*, 10 Wis. 195 (1860); *In re Booth*, 3 Wis. 1 (1854); *Ableman v. Booth*, 11 Wis. 498 (1859).

38. Act of April 13, 1854, ch. 89, § 1–3, 1854 Wis. Sess. Laws 131 (rejected by voters Nov. 1854); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235.

39. WIS. CONST. art. IV, § 21, art. V, §§ 5, 9; 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235.

increase the size of the Wisconsin Supreme Court due to the court's ever-increasing workload. A proposal to expand the number of justices from three to five was defeated in 1872 but soon resurfaced and was approved in 1877.⁴⁰ Other amendments submitted in the 1880s concerned official salary increases and whether legislative sessions should be annual or biennial.⁴¹

TABLE 1
AMENDMENTS TO THE WISCONSIN CONSTITUTION⁴²

Era	Total Amendments Submitted to Voters	Average per Year	Percentage Approved	Percentage of "Housekeeping" Amendments Proposed
1848–1900	24	0.46	71%	75%
1900–1920	27	1.35	52%	33%
1920–1960	40	1.00	73%	33%
1960–present	101	2.19	84%	38%

The only nineteenth century amendments of enduring importance concerned limits on municipal debt and on individual incorporation laws.⁴³ Both amendments responded to problems that plagued many American states in the mid-nineteenth century. Starting in the early part of the century, most states went through a cycle consisting of a "wide-open" era in which they actively promoted construction of railroads and other internal improvements through state subsidies, followed by a "reactive" era in which such subsidies were restricted or eliminated and finally by a "municipal" era in which the states debated the extent to which municipalities should be allowed to subsidize private enterprise.⁴⁴ Wisconsin's 1847–1848 convention, heavily influenced by the recent failure of state subsidy schemes in Michigan and Illinois, prohibited state aid for internal improvements but said nothing about

40. Act of Mar. 23, 1872, ch. 111, 1872 Wis. Sess. Laws 128 (rejected by voters Nov. 1872); Act of Feb. 24, 1877, ch. 48, 1877 Wis. Sess. Laws 99 (approved by voters Nov. 1877); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235.

41. 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235.

42. The statistics in the table are compiled from the 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235–40.

43. 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235.

44. GOODRICH, *supra* note 22, at 208–55; RANNEY, *supra* note 7, at 123–30.

municipal subsidies.⁴⁵ During the 1850s, many Wisconsin municipalities, recognizing that procurement of rail service was essential to their survival, competed to see who could be the most generous in attracting railroads. Every railroad in Wisconsin became insolvent during the depression of 1857–1858; as a result, many municipalities faced potentially ruinous bond and note payment obligations with little to show for such obligations.⁴⁶

Municipalities made repeated efforts to find a legal escape from their obligations, all of which were rebuffed by the Wisconsin Supreme Court. In 1859, the court confirmed that the constitutional prohibition on subsidies applied only to the state, not to municipalities.⁴⁷ Justice Orsamus Cole, who had served in the 1847–1848 convention, explained frankly that “if the country had then had the experience of the last ten years . . . a provision would have been incorporated in the constitution to prevent the evil [of unrestrained municipal subsidies]. But this was not done; and we cannot construe the constitution as though such a prohibition was there.”⁴⁸ Municipal debtors then argued that railroad subsidies were invalid because municipalities could only incur debt for public purposes, not for aid to private corporations. In *Whiting v. Sheboygan & Fond du Lac R.R.*,⁴⁹ the court divided on the issue. Chief Justice Luther S. Dixon drew a tortuous line between direct aid, which he concluded was not permissible, and indirect aid such as the purchase of stock, which was permissible.⁵⁰ Justice Byron Paine, dissenting, argued that railroads “have done more to develop the wealth and resources . . . of the country than any other” force and that it made no sense to say that subsidies were improper simply because “in executing the great public work, the state has made use of the agency of a private corporation, and left to it the comparatively petty and unimportant profits to be derived from the actual operation of the road!”⁵¹ The *Whiting* decision was heavily criticized,⁵² and in 1874, the legislature and

45. RANNEY, *supra* note 7, at 66–67; Journal and Debates of the Convention, *supra* note 22, at 419–20, 581–82.

46. RANNEY, *supra* note 7, at 126.

47. *Bushnell v. Beloit*, 10 Wis. 195 (1860); *see also* *Clark v. City of Janesville*, 10 Wis. 135 (1859).

48. *Bushnell*, 10 Wis. at 224.

49. 25 Wis. 167 (1870).

50. *Id.* at 196–97.

51. *Id.* at 219–20 (Paine, J., dissenting).

52. *See* *Olcott v. Supervisors of Fond du Lac County*, 83 U.S. 678, 695–97 (1873); RANNEY, *supra* note 7, at 129–30.

voters finally resolved the problem by amending the constitution to provide that municipalities could not incur total debt greater than five percent of the assessed value of all property within their limits.⁵³

Prior to the 1870s, legislatures in Wisconsin and most other states enacted individual charters for corporations; few general incorporation laws existed.⁵⁴ In the 1830s, Jacksonians complained that the individual incorporation system made it easy for politically-influential businessmen to obtain "exclusive privileges and monopolies, whereby the few may be enabled to amass wealth at the expense of the many."⁵⁵ Wisconsin's 1848 constitution permitted, but did not require, the legislature to enact general incorporation laws.⁵⁶ In the 1850s and 1860s, sentiment for general incorporation laws increased, partly because of continuing concerns over favoritism in individual charters but primarily because as the state and its economy grew, incorporations were consuming ever greater amounts of the legislature's time.⁵⁷ In 1872, voters approved an amendment prohibiting individual laws for corporations and for a variety of other subjects;⁵⁸ in 1892, the prohibition was extended to municipal charters.⁵⁹

C. Amendments During the Progressive Era, 1900–1920: A Period of Cautionary Reaction

Wisconsin has long been recognized as one of the most innovative states of the Progressive era, and the era has justifiably been regarded as a golden period in Wisconsin's history. From 1901 (when Robert LaFollette first assumed the governorship) until 1915, Wisconsin enacted a succession of reforms that put the state at the forefront of the national transition to a mature industrial society dominated by large corporate and governmental institutions.⁶⁰ The variety and extent of

53. Act of Feb. 18, 1874, ch. 37, 1874 Wis. Sess. Laws 43 (approved by voters Nov. 1874); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235.

54. JOHN W. CADMAN, JR., *THE CORPORATION IN NEW JERSEY: BUSINESS AND POLITICS 1791–1875*, at 6–14 (1949); RANNEY, *supra* note 7, at 139–43.

55. GEORGE J. KUEHN, *THE WISCONSIN BUSINESS CORPORATION* 72 (1959) (quoting *THE SOUTHPORT AMERICAN* (Kenosha, Wis.), August 29, 1846).

56. WIS. CONST. art. XI, § 1.

57. See also CADMAN, JR., *supra* note 54, at 6–14; RANNEY, *supra* note 7, at 139–43.

58. Act of Mar. 23, 1871, ch. 122, 1871 Wis. Sess. Laws 183 (approved by voters Nov. 1871); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235.

59. Act of Apr. 22, 1891, ch. 362, 1891 Wis. Sess. Laws 468 (approved by voters Nov. 1892); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235.

60. See RANNEY, *supra* note 7, at 255–56, 359–60, 380–88. See generally DAVID P. THELEN, *THE NEW CITIZENSHIP: ORIGINS OF PROGRESSIVISM IN WISCONSIN, 1885–1900*

Progressive reforms was astonishing. In order to improve government operations, Progressive governors and legislators enacted the nation's first statewide open primary law in 1903⁶¹ and a state civil service law in 1905,⁶² as well as creating a legislative reference library that quickly became an indispensable clearinghouse of information for reformers and served as a model for other states.⁶³ Progressives also reshaped Wisconsin's tax system, which had relied heavily on property taxes in the nineteenth century,⁶⁴ to fit the industrial age: the legislature enacted an inheritance tax in 1903⁶⁵ and a comprehensive income tax law in 1911 that was carefully designed to distribute the tax burden fairly among old and new forms of wealth and that soon became the main source of money to pay for reforms in other areas.⁶⁶ In 1907, the legislature enacted one of the first major American public utility laws, which embodied the doctrine advanced by Richard Ely of the University of Wisconsin that utilities could function best if they were given local monopolies and a guarantee of reasonable (albeit limited) profits in exchange for close government regulation of their rates and operations.⁶⁷ In 1911, the legislature enacted the nation's first successful worker's compensation law⁶⁸ and also created the Wisconsin Industrial Commission, the first American state agency charged with comprehensive regulation of workplace safety.⁶⁹ Chief Justice John Winslow and his colleagues on the Wisconsin Supreme Court upheld

(1972); ROBERT S. MAXWELL, *LAFOLLETTE AND THE RISE OF THE PROGRESSIVES IN WISCONSIN* (1956); HERBERT F. MARGULIES, *THE DECLINE OF THE PROGRESSIVE MOVEMENT IN WISCONSIN, 1890-1920* (1968).

61. Ch. 451, 1903 Wis. Sess. Laws 754.

62. Ch. 363, 1905 Wis. Sess. Laws 570.

63. Act of Apr. 17, 1901, ch. 168, 1901 Wis. Sess. Laws 213; *see also* EDWARD A. FITZPATRICK, MCCARTHY OF WISCONSIN 134-36 (1944).

64. RANNEY, *supra* note 7, at 290-96; Jack Stark, *A History of the Property Tax System and Property Tax Relief in Wisconsin*, in WIS. LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN 1991-1992 BLUE BOOK 103 (1991).

65. Ch. 44, 1903 Wis. Sess. Laws 65.

66. Act of July 13, 1911, ch. 658, 1911 Wis. Sess. Laws 984; John O. Stark, *The Establishment of Wisconsin's Income Tax*, WIS. MAG. HIST., Autumn 1987, at 27-45.

67. Act of July 9, 1907, ch. 499, 1907 Wis. Sess. Laws 1130; RANNEY, *supra* note 7, at 317-20; BENJAMIN G. RADER, *THE ACADEMIC MIND AND REFORM: THE INFLUENCE OF RICHARD T. ELY IN AMERICAN LIFE* 41-82 (1966).

68. Act of May 3, 1911, ch. 50, 1911 Wis. Sess. Laws 43; *see also* Robert Asher, *The 1911 Wisconsin Workmen's Compensation Law: A Study in Conservative Labor Reform*, WIS. MAG. HIST., Winter 1973-1974, at 123-140.

69. Act of June 30, 1911, ch. 485, 1911 Wis. Sess. Laws 581; RANNEY, *supra* note 7, at 340-43.

virtually all of the Progressive reform laws,⁷⁰ and Winslow gained a national reputation as a thoughtful exponent of the need to balance longstanding judicial values of respect for precedent and property rights against the reality that laws and constitutional interpretation must change to fit new social conditions.⁷¹

The role of constitutional change in the Progressive era has seldom been examined, perhaps because constitutional amendments played only a small role in the advance of reform. Strikingly, the rate of rejection of amendments soared during the era: the legislature submitted a total of twenty-seven amendments to the voters between 1900 and 1920, but barely half were approved, although several that passed have had an enduring impact on Wisconsin's legal system.⁷² Progressives deeply believed that their reforms were vital to the state's well-being, but there is no evidence they believed constitutional enshrinement was vital. A few reforms were implemented through amendments, mainly in order to eliminate existing constitutional obstacles. In 1902, voters eliminated the constitution's limitations on banking laws and prohibited railroads from issuing free passes, but these changes had been initiated before the Progressives took power.⁷³ With LaFollette's approval, the 1905 legislature approved an amendment eliminating the 1848 provision extending suffrage to aliens who had declared their intent to become citizens;⁷⁴ it also set in motion an amendment authorizing a state income tax.⁷⁵ Both amendments were approved by the 1907 legislature and ratified by voters in 1908.⁷⁶

Progressives in other states, most notably California, created constitutional provisions allowing voters to propose laws by petition and to bypass the legislature by enacting laws directly through the initiative

70. RANNEY, *supra* note 7, at 364–77.

71. *Id.*

72. *Id.*

73. Act of Mar. 23, 1901, ch. 73, 1901 Wis. Sess. Laws 94 (banking laws) (approved by voters Nov. 1902); Act of May 14, 1901, ch. 437, 1901 Wis. Sess. Laws 623 (free passes) (approved by voters Nov. 1902); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235.

74. J. Res. 15, 1905 Wis. Sess. Laws 994; 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235.

75. J. Res. 12, 1905 Wis. Sess. Laws 992; 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235.

76. Act of July 16, 1907, ch. 661, 1907 Wis. Sess. Laws 1253 (approved by voters Nov. 1908); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235.

and referendum process.⁷⁷ Wisconsin's 1911 legislature, which arguably produced the most important reform legislation of the Progressive era, approved petition and initiative amendments; the 1913 legislature followed suit but voters rejected the amendments decisively at the 1914 election, which marked the end of the first Progressive era in Wisconsin.⁷⁸ The 1911 and 1913 legislatures approved eight other amendments, all of which were also defeated in 1914.⁷⁹ Some were housekeeping measures—for example, additional judgeships and more changes in officials' pay were proposed⁸⁰—but others, such as measures allowing popular recall of elected officials, establishing a state-sponsored insurance system, and expanding municipalities' home rule powers, would have materially advanced the Progressive agenda.⁸¹ It is not clear why voters rejected the 1914 amendments. The contest between LaFollette supporters and conservatives for state offices dominated the 1914 election, and there was little public discussion of the amendments, but voters responded positively to conservatives' argument that reform had proceeded too fast and had cost too much, and most likely this feeling also extended to the amendments.⁸² Voters rejected additional amendments submitted at the 1920 and 1922 elections, although most of those involved housekeeping matters; no further amendments were ratified until 1924.⁸³

D. Amendments, 1920–1960: A Sedate Period

After 1920, the pace of proposed amendments moderated (although it remained higher than it had been before LaFollette's time) and voter receptivity to amendments increased.⁸⁴ The proportion of amendments dealing with housekeeping matters slowly declined, due in part to a 1929 amendment that finally removed all official pay matters from the

77. JAMES J. RAWLS & WALTON BEAN, CALIFORNIA: AN INTERPRETIVE HISTORY 253–54 (6th ed. 1993); ARTHUR S. LINK & RICHARD L. MCCORMICK, PROGRESSIVISM 34, 57–58, 61 (1983).

78. See Act of Aug. 7, 1913, ch. 770, § 1, 1913 Wis. Sess. Laws 1209 (rejected by voters Nov. 1914); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 236.

79. See Act of Aug. 7, 1913, ch. 770, 1913 Wis. Sess. Laws 1209 (rejected by voters Nov. 1914); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 236.

80. Ch. 770, §§ 6–7, 1913 Wis. Sess. Laws 1209.

81. *Id.* §§ 11–13, 1913 Wis. Sess. Laws 1209.

82. See ROBERT S. MAXWELL, EMANUEL L. PHILIPP: WISCONSIN STALWART 85–89 (1959); MARGULIES, *supra* note 60, at 157–63.

83. See 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 236.

84. *Id.* at 236–37; see Figure 1 and accompanying text *infra* Part III.B.

constitution and left them entirely to the legislature.⁸⁵ The most controversial, and one of the most persistent, amendment issues during the 1920–1960 period was the amount of time sheriffs should be allowed to hold office. The 1848 constitution specified that sheriffs could not serve consecutive terms: they must step down for at least two years after serving a term.⁸⁶ Such limitation proved unpopular in many parts of the state, and the controversy came to a head in the 1920s: in 1922 voters rejected an amendment allowing unlimited terms, but in 1929 they approved a provision allowing sheriffs to serve for two consecutive terms.⁸⁷ Efforts to remove the two-term limitation were defeated in 1946, 1956 and 1961, but voters finally approved unlimited terms for sheriffs in 1967.⁸⁸

Many substantive amendments approved between 1920 and 1960 were merely modest extensions of earlier constitutional reforms. During the Progressive era, the legislature created the state's first systematic conservation program through a series of laws, collectively known as the Forestry Law, that created a state forest reserve, provided for state management and restoration of northern Wisconsin's logged-over pine forests, allowed only limited timber harvests on state lands, and required that timber revenues be used to purchase additional forest reserves.⁸⁹ Because of concerns that the Forestry Law might conflict with the constitution's prohibition of subsidies for internal improvements, the 1907 legislature initiated and voters approved in 1910 an amendment explicitly allowing such expenditures.⁹⁰ However, in *State ex rel. Owen v. Donald* (1915), the supreme court held that the 1910 amendment was void because of technical defects and because

85. J. Res. 6, 1929 Wis. Sess. Laws 1065 (approved by voters Apr. 1929); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 236.

86. WIS. CONST. art. VI, § 4 (amended 1929).

87. Act of July 27, 1921, ch. 437, 1921 Wis. Sess. Laws 654 (rejected by voters Nov. 1922); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 236.

88. J. Res. 47, 1945 Wis. Sess. Laws 1144 (rejected by voters Apr. 1946); J. Res. 53, 1955 Wis. Sess. Laws 817 (rejected by voters Apr. 1956); J. Res. 9, 1961 Wis. Sess. Laws 693 (rejected by voters Apr. 1961); J. Res. 12, 1967 Wis. Sess. Laws 491 (approved by voters Apr. 1967); 2005–06 Wisconsin Blue Book, *supra* note 5, at 237–38.

89. Ch. 450, 1903 Wis. Sess. Laws 944; ch. 264, 1905 Wis. Sess. Laws 383; Act of July 9, 1907, ch. 491, 1907 Wis. Sess. Laws 1125; Act of May 18, 1909, ch. 137, 1909 Wis. Sess. Laws 138; Act of July 11, 1911, ch. 639, 1911 Wis. Sess. Laws 859. *See generally* VERNON CARSTENSEN, FARMS OR FORESTS: EVOLUTION OF A STATE LAND POLICY FOR NORTHERN WISCONSIN, 1850–1932 (1958).

90. J. Res. 31, 1907 Wis. Sess. Laws 1293 (first consideration); Act of June 16, 1909, ch. 514, 1909 Wis. Sess. Laws 661 (approved by voters Nov. 1910); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235; *see also* CARSTENSEN, *supra* note 89, at 38–43.

state forestry expenditures violated the internal improvements clause.⁹¹ Justice Roujet Marshall, writing for the majority, rejected Progressives' argument that the term "internal improvements" in the constitution should be defined flexibly to exclude forestry and that creation of the reserve was a public purpose justifying government expenditures.⁹² Chief Justice Winslow, concurring, objected to Marshall's narrow concept of public purpose. Conservation, said Winslow, "has not been recognized as [a public purpose] until recently perhaps, but that is merely because the conditions which make it such have only recently arisen and become acute."⁹³ Marshall's decision in *Owen* was unpopular and played a role in his defeat for reelection two years later.⁹⁴ In 1924, voters amended the internal improvements clause of the constitution to allow state-funded conservation programs (this time taking care to avoid technical flaws in the amendment process),⁹⁵ and in 1927, they amended the constitution's uniform taxation clause to exempt forest lands from taxation.⁹⁶

A central theme of the amendments of the 1920–1960 period was incremental expansion of governmental authority to promote social and economic welfare. Following the defeat of a broad municipal home rule amendment in 1914,⁹⁷ supporters of increased municipal powers moved slowly but persistently to obtain what they wanted. A proposed amendment to allow municipalities to exceed the five percent debt limit in order to purchase municipal utilities failed in 1924 but passed in 1932.⁹⁸ Twenty years later, as the "baby boom" generation began to

91. 160 Wis. 21, 84, 151 N.W. 331, 351 (1915).

92. *Id.* at 136–38, 151 N.W. at 369. One eminent legal historian has described Marshall's opinion as a "deep emotional reaction against the style of legal action that the [Forestry Law] represented. These feelings grew naturally out of the confrontation between men bred in the buoyant opportunism of nineteenth-century action and an emerging twentieth century insistence on closer, more professional rationalization of economic and social processes." JAMES WILLARD HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836–1915*, at 585 (1964).

93. 160 Wis. at 160, 151 N.W. at 369.

94. RANNEY, *supra* note 7, at 175–76; *see* Editorial, WIS. STATE J., April 2, 1917.

95. Act of June 25, 1923, ch. 289, 1923 Wis. Sess. Laws 482 (approved by voters Nov. 1924); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 236.

96. J. Res. 13, 1927 Wis. Sess. Laws 972 (approved by voters Apr. 1927); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 236.

97. Act of Aug. 7, 1913, ch. 770, 1913 Wis. Sess. Laws 1209 (rejected by voters Nov. 1914); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 236.

98. Act of June 4, 1923, ch. 203, 1923 Wis. Sess. Laws 380 (rejected by voters Nov. 1924); J. Res. 14, 1931 Wis. Sess. Laws 948 (approved by voters Nov. 1932); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 236.

enter Wisconsin schools and creation of new schools and teachers became urgent, voters raised the five percent debt limit to eight percent for combined municipal and school purposes.⁹⁹ The limit was raised to ten percent in 1961.¹⁰⁰ The trend spread to the state level at the close of World War II, a time when Wisconsinites had become fully accustomed to government playing an active economic and social role and were looking to state government to ease the transition from a wartime to a peacetime economy.¹⁰¹ Voters had amended the internal improvements clause in 1908 to allow highway spending¹⁰² and in 1924 to allow forestry spending;¹⁰³ in 1945 they expanded the clause to allow spending on aeronautical programs,¹⁰⁴ in 1949 to allow subsidies for veterans housing,¹⁰⁵ and in 1960 for development of state ports.¹⁰⁶ Such amendments were thought necessary in order to avoid concerns over the constitution's internal improvements clause.¹⁰⁷

The 1920–1960 era also witnessed modest but important changes in Wisconsin's governmental structure. In 1926, Progressives salvaged a small part of their direct government program from the wreckage of 1914 by persuading voters (by the narrowest of margins) to adopt a provision allowing direct recall of state officials.¹⁰⁸ In 1930, voters addressed the legislative practice of “logrolling,” that is, inserting individual legislators’ pet projects into budget bills and presenting the governor with the choice of either tolerating waste or vetoing the entire budget, by amending the constitution to allow the governor to impose

99. J. Res. 6, 1951 Wis. Sess. Laws 638 (approved by voters Apr. 1951); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 237.

100. J. Res. 8, 1961 Wis. Sess. Laws 692 (approved by voters Apr. 1961); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 237.

101. See *infra* text accompanying notes 105–07.

102. Act of June 19, 1907, ch. 238, 1907 Wis. Sess. Laws 889 (approved by voters Nov. 1908); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235.

103. Act of June 28, 1923, ch. 289, 1923 Wis. Sess. Laws 482 (approved by voters Nov. 1924); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 236.

104. J. Res. 3, 1945 Wis. Sess. Laws 114 (approved by voters Apr. 1945); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 237.

105. J. Res. 1, 1949 Wis. Sess. Laws 637 (approved by voters Apr. 1949); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 237.

106. J. Res. 15, 1959 Wis. Sess. Laws 918 (approved by voters Apr. 1960); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 237.

107. See WIS. CONST. art. VIII, § 10.

108. Act of June 8, 1925, ch. 270, 1925 Wis. Sess. Laws 348 (approved by voters Nov. 1926); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 236.

partial vetoes on appropriations bills.¹⁰⁹ Governor Tommy Thompson's creative use of the partial veto in the late 1980s and 1990s would later spark a reaction and a new amendment to the veto power.¹¹⁰

E. Amendments, 1960–Present: Reform and Reaction Revisited

The 1960s witnessed a dramatic rise in the number of proposed amendments to the Wisconsin Constitution. The tide of amendments receded somewhat after 1970, but has remained high compared to preceding eras.¹¹¹ But at the same time, there has been only a modest rise in the number of housekeeping amendments, and relatively few recent substantive amendments are likely to have lasting historical importance.¹¹²

Although the number of housekeeping amendments since 1960 has been comparatively modest, some of the amendments have made important changes in Wisconsin's governmental structure. In 1967, voters extended the terms of the governor and other state officers from two years to four; this has given recent governors a longer period of time in which to develop and enact their programs and has significantly changed the dynamics of the interaction between the governor and the legislature.¹¹³ In 1977, voters approved a sweeping overhaul of Wisconsin's judicial system: a patchwork of local courts which had grown in random fashion over the course of a century was replaced with a unitary circuit court system and an intermediate court of appeals, which has reduced the supreme court's workload and has become a major new source of case law shaping the state's legal system.¹¹⁴ In the late 1980s, Governor Thompson interpreted his partial veto power to allow deletion of individual numbers and letters from language in legislative bills, thus enabling him in many cases to substitute his own budget figures and even his own policies for those enacted by the

109. J. Res. 43, 1929 Wis. Sess. Laws 1079 (approved by voters Nov. 1930); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 236. See generally Arthur J. Harrington, *The Propriety of the Negative—The Governor's Partial Veto Authority*, 60 MARQ. L. REV. 865 (1977).

110. RANNEY, *supra* note 7, at 614–19.

111. See Figure 1 and accompanying text *infra* Part III.B.

112. See Figure 1 and accompanying text *infra* Part III.B.

113. J. Res. 10, 1967 Wis. Sess. Laws 489 (approved by voters Apr. 1967); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 238.

114. J. Res. 7, 1977 Wis. Sess. Laws 890 (approved by voters Apr. 1977); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 239; RANNEY, *supra* note 7, at 596–601. See generally Donald P. Kommers, *The Development and Reorganization of the Wisconsin Court System* (Ph.D. thesis, Univ. of Wisconsin, 1963).

legislature.¹¹⁵ The Wisconsin Supreme Court largely agreed with Thompson's view of his powers,¹¹⁶ and in reaction, the legislature passed and voters approved in 1990 an amendment prohibiting the deletion of individual letters from bills.¹¹⁷

A review of proposed substantive amendments since 1960 reveals at least two important trends. First, there has been relatively little amendment of the constitution in response to the steady expansion of government and government programs since 1960. It appears that lawmakers and voters have found the statutory process and the concept of "public purpose" as constitutionally defined prior to 1960 to be adequate for such expansion.¹¹⁸ Voters have generally resisted further expansion of state and municipal powers. In 1975 and 1976, they rejected proposals to exclude certain types of debt from the five percent debt limit and to increase the limit to ten percent for all purposes.¹¹⁹ In 1968, they agreed to expand the types of taxes that can be used to pay for forestry programs,¹²⁰ and in 1975 they modestly expanded the 1949 exception to the internal improvements clause for veterans housing,¹²¹ but in 1991 they refused to expand the exception to encompass low income housing.¹²²

Second, there has been a dramatic increase in the use of constitutional amendments to promote non-economic social policies. The two leading examples are the rise of state support for parochial schools and of state-sanctioned gambling. The 1848 constitution

115. RANNEY, *supra* note 7, at 614–19.

116. *Id.*; see, e.g., *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988); *Citizens Utility Bd. v. Klauser*, 194 Wis. 2d 485, 534 N.W.2d 508 (1995). *But see* *Risser v. Klauser*, 207 Wis. 2d 177, 558 N.W.2d 108 (1997) (finding that the governor exceeded his partial veto authority in a specific instance).

117. See WIS. CONST. art. V, § 10(1)(c); accord *J. Res. 39*, 1989 Wis. Sess. Laws 1793 (approved by voters Apr. 1990); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 239.

118. See 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 238–40; *Town of Beloit v. County of Rock*, 2003 WI 8, ¶ 27, 259 Wis. 2d 37, ¶ 27, 657 N.W.2d 344, ¶ 27 (“[A]lthough there is no specific language in the state constitution establishing the public purpose doctrine, this court has recognized that the doctrine is firmly accepted as a basic constitutional tenet mandating that public appropriations may not be used for other than public purposes.”).

119. *J. Res. 33*, 1973 Wis. Sess. Laws 1152 (rejected by voters Apr. 1975); *J. Res. 6*, 1975 Wis. Sess. Laws 1464 (rejected by voters Apr. 1976); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 238–39.

120. *J. Res. 25*, 1967 Wis. Sess. Laws 502 (approved by voters Apr. 1968); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 238.

121. *J. Res. 3*, 1975 Wis. Sess. Laws 1462 (approved by voters Apr. 1975); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 238.

122. *J. Res. 2*, 1991 Wis. Sess. Laws 1799 (rejected by voters Apr. 1991); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 239.

required the state to create a system of free common schools in which “no sectarian instruction shall be allowed.”¹²³ Between 1850 and 1900, German Catholics immigrated to Wisconsin in large numbers; in many cases they preferred parochial, German-language schools to public schools. Tension steadily increased between them and Wisconsinites of Yankee background, who favored use of public schools to foster cultural assimilation of immigrant children.¹²⁴ The conflict came to a head in 1889 when the legislature enacted the Bennett Law, mandating English-language instruction in all schools and restricting immigrants’ ability to establish parochial schools.¹²⁵ The Bennett Law triggered a sharp political reaction: the 1891 legislature repealed the law, but parochial school supporters, recognizing the depth of Yankee sentiment and that assimilation was important to their children’s future success, abandoned further efforts to preserve German-language instruction and many other badges of cultural separateness.¹²⁶

Parochial school supporters then launched a campaign to gain state funding, particularly for school busing. After several rebuffs by the legislature and the Wisconsin Supreme Court, mainly due to concerns that such funding might violate constitutional restrictions on sectarian instruction and separation between church and state, supporters turned to the constitutional amendment process.¹²⁷ A proposed amendment to allow state aid for parochial school busing was defeated in 1946,¹²⁸ but a similar amendment was finally approved in 1967.¹²⁹ Since that time, the supreme court has been more sympathetic to limited state funding of parochial schools and no further constitutional amendments have been proposed.¹³⁰

123. WIS. CONST. art. XI, § 3 (amended).

124. Joseph A. Ranney, “*Absolute Common Ground*”: *The Four Eras of Assimilation in Wisconsin Education Law*, 1998 WIS. L. REV. 790, 796–801.

125. Act of Apr. 18, 1889, ch. 519, 1889 Wis. Sess. Laws 729. See generally Louise P. Kellogg, *The Bennett Law in Wisconsin*, WIS. MAG. HIST., Sept. 1918, at 3.

126. Ranney, *supra* note 124, at 802–03.

127. *Id.* at 803–05; State *ex rel.* Van Straten v. Milquet, 180 Wis. 109, 192 N.W. 392 (1923); Costigan v. Hall, 249 Wis. 94, 23 N.W.2d 495 (1946); William W. Boyer, Jr., *Public Transportation of Parochial School Pupils*, 1952 WIS. L. REV. 64, 67–78.

128. J. Res. 78, 1945 Wis. Sess. Laws 1165 (rejected by voters Nov. 1946); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 237.

129. J. Res. 13, 1967 Wis. Sess. Laws 492 (approved by voters Apr. 1967); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 238.

130. Ranney, *supra* note 124, at 805–20; see State v. Yoder, 49 Wis. 2d 430, 182 N.W.2d 539 (1971), *aff’d*, 406 U.S. 205 (1972); Jackson v. Benson, 218 Wis. 2d 835, 578 N.W.2d 602 (1998), *cert. denied*, 525 U.S. 997 (1998).

In 1848, gambling, though popular with many Americans, was officially and often strenuously disapproved of by many religious denominations and by most state and local governments.¹³¹ The 1848 constitution tersely provided that “The legislature shall never authorize any lottery,” and for more than a century this was construed to prohibit all forms of gambling for money in Wisconsin.¹³² After World War II, popular attitudes gradually relaxed toward gambling, sex, and other activities that historically had been subjects of moral controversy.¹³³ In 1965, Wisconsin voters created the first breach in the wall against gambling by amending the constitution to make clear that game show contests would not be considered lotteries within the meaning of the constitution.¹³⁴ The breach expanded steadily. In 1973, the voters gave charitable bingo games constitutional sanction, and in 1977, they extended the sanction to charitable raffles.¹³⁵

The economic stagnation and sharp anti-tax sentiment of the late 1970s and early 1980s led many states, including Wisconsin, to look to gambling as a new source of revenue,¹³⁶ and in 1987, after extensive public debate, voters authorized a state lottery and pari-mutuel betting.¹³⁷ In 1995, voters rejected a proposed amendment to authorize a sports lottery, dedicated to building athletic facilities,¹³⁸ but in 1999, they affirmed that state revenues from gambling were to serve as a source of property tax relief.¹³⁹ The gambling amendments have

131. See Jonathan Kasperek, *Void in Wisconsin*, WIS. MAG. HIST., Autumn 2006, at 36, 37–40; ANN FABIAN, *CARD SHARPS AND BUCKET SHOPS: GAMBLING IN NINETEENTH-CENTURY AMERICA* 113–28 (1990). See generally JOHN M. FINDLAY, *PEOPLE OF CHANCE: GAMBLING IN AMERICAN SOCIETY FROM JAMESTOWN TO LAS VEGAS* 11–43 (1986).

132. WIS. CONST. art. IV, § 24 (amended).

133. See FINDLAY, *supra* note 131, at 125–49; LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 341–50 (1993).

134. J. Res. 2, 1965 Wis. Sess. Laws 831 (approved by voters Apr. 1965); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 238.

135. J. Res. 3, 1973 Wis. Sess. Laws 1127 (approved by voters Apr. 1973); J. Res. 6, 1977 Wis. Sess. Laws 889 (approved by voters Apr. 1977); 2005–06 Wisconsin Blue Book, *supra* note 5, at 238–39.

136. See generally DAN RITSCH, WIS. LEGISLATIVE REFERENCE BUREAU, RESEARCH BULLETIN 00-1, *THE EVOLUTION OF LEGALIZED GAMBLING IN WISCONSIN* (2000).

137. J. Res. 3, 1987 Wis. Sess. Laws 687 (pari-mutuel betting) (approved by voters Apr. 1987); J. Res. 4, 1987 Wis. Sess. Laws 688 (state lottery) (approved by voters Apr. 1987); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 239.

138. J. Res. 2, 1995 Wis. Sess. Laws 2502 (rejected by voters Apr. 1995); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 240.

139. J. Res. 2, 1999 Wis. Sess. Laws 1588 (approved by voters Apr. 1999); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 240.

effectively eviscerated the constitution's original prohibition against gambling. In hindsight, perhaps it would have been better to either eliminate the anti-gambling clause altogether or to provide that gambling matters shall be left to the legislature. But voters clearly were not ready for such a step in the 1960s and 1970s; the current patchwork nature of the constitution's gambling clause suggests that in the case of a fundamental document, major changes must be made incrementally rather than in a sweeping manner if they and the constitution are to last.

Use of amendments to implement other controversial social policies has also flourished in recent years. In response to complaints that Wisconsin criminal law put too much emphasis on the rights of the accused and ignored the needs of crime victims, the 1991 legislature proposed, and in 1993 voters adopted, an amendment giving crime victims the right to be treated with dignity and to be involved in prosecution of cases.¹⁴⁰ In 1998, voters approved an amendment to the constitution's bill of rights guaranteeing the right to keep and bear arms for security, recreation, and other lawful purposes,¹⁴¹ and in 2003, they created a constitutional right to fish, hunt, and take game.¹⁴² In response to the legalization of civil unions for same-sex partners in several eastern states and the Massachusetts supreme court's 2003 decision that same-sex couples have a constitutional right to marry,¹⁴³ the 2003 and 2005 Wisconsin legislatures approved a broad "defense of marriage amendment" explicitly prohibiting same-sex marriages and arguably precluding state and local governments from giving same-sex couples other benefits.¹⁴⁴ In November 2006, after a hard-fought campaign, Wisconsin voters ratified the amendment by a 59%–41% margin.¹⁴⁵ Such recent amendments have prompted complaints that the legislature

140. J. Res. 17, 1991 Wis. Sess. Laws 1809 (first consideration); J. Res. 2, 1993 Wis. Sess. Laws 1833 (approved by voters Apr. 1993); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 240.

141. J. Res. 21, 1997 Wis. Sess. Laws 2332 (approved by voters Nov. 1998); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 240.

142. J. Res. 8, 2003 Wis. Sess. Laws 1097 (approved by voters Apr. 2003); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 240.

143. See Carl Rasmussen & Susan L. Collins, *Wisconsin Constitutional Amendment to Define Marriage: The Legal Context*, WIS. LAWYER, Mar. 2005, at 16; Goodridge v. Dep't of Public Health, 798 N.E.2d 941 (Mass. 2003); see also Baker v. State, 744 A.2d 864 (Vt. 1999).

144. J. Res. 29, 2003 Wis. Sess. Laws 1111 (first consideration); J. Res. 30, 2005 Wis. Sess. Laws 1 (approved by voters Nov. 2006); Rasmussen & Collins, *supra* note 143, at 16.

145. Wis. State Elections Board, Results of Referendum: 11/07/2006, available at <http://elections.state.wi.us/docview.asp?docid=10047&locid=47>.

is using the amendment process too freely, often merely as a device to avoid gubernatorial vetoes of controversial measures.¹⁴⁶

III. AN AGGREGATE ANALYSIS OF THE CONSTITUTION'S AMENDMENTS

A. *Historical Trends by Subject*

Persons attempting to classify state constitutional provisions can choose from a large menu of categories. Thomas Cooley, the first great scholar of state constitutions, set forth five categories: bills of rights; suffrage; creation of a governmental framework; creation of checks and balances between the branches of government; and local government.¹⁴⁷ Lutz has added several categories to Cooley's taxonomy including taxation, handling of debt, and social and economic activities to be undertaken by the state.¹⁴⁸ All American state constitutions include Cooley's basic categories; the additional categories they feature depend largely on the degree of detail their authors chose to put in them and on accidents of history. In order to analyze Wisconsin's constitutional amendments by subject category, it is most useful to construct categories from the amendments themselves rather than trying to fit the amendments into a predetermined taxonomy.

TABLE 2
"TRADITIONAL" CATEGORIES OF PROPOSED AMENDMENTS¹⁴⁹

	Suffrage	Legislative Organization and Powers	Judicial Organization and Powers
1848–1900	1	2	4
1900–1920	3	6	4
1920–1960	3	4	4
1960–present	4	8	13

146. See *supra* text accompanying note 6.

147. COOLEY, *supra* note 3, at 34–35.

148. Lutz, *supra* note 3, at 36–37.

149. The data in the table are compiled from the 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235–40.

In Wisconsin, certain types of amendments have surfaced consistently throughout the state's history while other types have become prominent only in recent decades. Amendments in three of Cooley's and Lutz's categories—suffrage, the legislative branch, and the judicial branch—have appeared regularly since 1848. The steady stream of legislative amendments is not surprising because the 1848 constitution reflected the then-prevailing belief that the bulk of state power should reside in the legislature rather than with the governor.¹⁵⁰ Wisconsin, like other states and in contrast to the Federal Constitution, vests plenary power in its legislature, limited only by restrictions placed elsewhere in the state constitution.¹⁵¹ Since 1848, voters have regularly considered housekeeping changes with respect to legislative salaries, terms of office and other organizational details¹⁵² and since 1908, they have gradually expanded legislative powers to act for the state's social and economic good.

Likewise, Wisconsin voters have regularly adjusted the organization of the judicial branch. The vast majority of judicial amendments have been housekeeping matters: after an early struggle to establish its proper role in state government, the supreme court held in *State ex rel. Bashford v. Barstow* that it had the final say as to whether actions of the executive and the legislature were constitutional,¹⁵³ and unlike the United States Congress, Wisconsin voters have never attempted to change the scope of their courts' jurisdiction or collective powers.¹⁵⁴ But the state has consistently found it necessary to tinker with the types of courts and number of judges assigned to exercise such powers, beginning with efforts to increase the size of the state supreme court in the 1870s¹⁵⁵ and continuing through the reorganization of the trial courts and creation of an intermediate court of appeals in the 1970s.¹⁵⁶ Suffrage amendments, though rare, have also occurred throughout the

150. FRIEDMAN, *supra* note 23, at 106–07.

151. WIS. CONST. art. IV, § 1.

152. See *supra* text accompanying notes 40–43, 82, 87–90 and 110–12. See generally 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235–40.

153. 4 Wis. 567, 659, 662, 746, 748 (1855).

154. See generally 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235–40. As to congressional laws limiting the jurisdiction of federal courts, see, for example, Judiciary Act, ch. 20, 1 STATS. 73 (1789); 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, RECONSTRUCTION AND REUNION 1864–1888, pt. 1, at 463–87 (1971) (discussing Congress's decision to deprive the U.S. Supreme Court of jurisdiction to hear appeals from habeas corpus cases during Reconstruction).

155. See *supra* text accompanying note 40.

156. See *supra* text accompanying note 114.

state's history. They have often tracked national movements to extend or modify suffrage. For example, the elimination of alien suffrage in 1908 reflected in part Progressive distaste for the party caucus system of the late nineteenth century, which had served as a vehicle for immigrants to assimilate into American politics and eventually acquire a share of power.¹⁵⁷ The Progressives' efforts to enact government reform by initiative, recall, and referendum also were part of a broad national movement.¹⁵⁸ Wisconsin's amendment of the constitution in 1934 to formally extend the vote to women merely confirmed the practical completion of that process fifteen years before,¹⁵⁹ and a 1953 amendment to require apportionment of legislative seats based on population as well as area was part of a national debate over apportionment finally resolved in 1962 when the United States Supreme Court held that apportionment must be based on population only.¹⁶⁰

TABLE 3
"MODERN" CATEGORIES OF PROPOSED AMENDMENTS¹⁶¹

	Bill of Rights	Executive Organization and Powers	Local Powers	State Debt, Taxation	Gambling
1848–1900	1	0	1	0	0
1900–1920	0	0	3	1	0
1920–1960	2	1	6	6	0
1960–present	11	3	17	8	7

Other types of amendments, while not completely unknown in the nineteenth and early twentieth centuries, have come to prominence only in recent decades. During its first century, Wisconsin considered

157. See THELEN, *supra* note 60, at 156–201; LINK & MCCORMICK, *supra* note 77, at 47–52.

158. See MARGULIES, *supra* note 60, at 157–58; LINK & MCCORMICK, *supra* note 77, at 34, 57–58, 61.

159. U.S. CONST. amend. XIX; J. Res. 76, 1933 Wis. Sess. Laws 1261 (approved by voters Nov. 1934); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 236; RANNEY, *supra* note 7, at 216.

160. Baker v. Carr, 369 U.S. 186 (1962). The Wisconsin Supreme Court invalidated the 1953 amendment based on technical defects. See *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953).

161. The data in the table are compiled from the 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235–40.

changes to its bill of rights only three times: it modified the grand jury system in 1870,¹⁶² modified jury trial rights in 1922 to allow five-sixths verdicts in civil cases,¹⁶³ and rejected an early effort to allow state support for parochial school transport in 1946.¹⁶⁴ But since 1960, the number of amendments implicating the bill of rights has increased dramatically. Wisconsin has redefined its concept of the relationship between church and state through a series of amendments allowing limited state support of parochial school activities.¹⁶⁵ In 1973, voters narrowly refused to approve an amendment enshrining equal rights for women,¹⁶⁶ but they have also approved an amendment to make the constitution's terminology gender neutral.¹⁶⁷ The most controversial amendments of recent years have implicated the bill of rights: the 1993 crime victim amendment can fairly be characterized as an attempt to counterbalance constitutional rights afforded to criminal defendants,¹⁶⁸ the 1998 arms amendment is Wisconsin's equivalent of the Second Amendment to the U.S. Constitution,¹⁶⁹ and the "defense of marriage" amendment is closely related to the issue of how Wisconsin's concept of equal rights applies to same-sex couples.¹⁷⁰

Other categories that have become dramatically more active since 1960 are gambling, local governmental powers, and state debt and taxation. As previously noted, the nineteenth century's moral disapproval of gambling reflected in the 1848 constitution remained intact for more than a century, but began eroding in 1965; after

162. Act of Mar. 17, 1870, ch. 118, 1869 Wis. Sess. Laws 180 (approved by voters Nov. 1870); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235.

163. Act of July 1921, ch. 504, 1921 Wis. Sess. Laws 840 (approved by voters Nov. 1922); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 236.

164. J. Res. 78, 1945 Wis. Sess. Laws 1165 (rejected by voters Nov. 1946); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 237.

165. See *supra* text accompanying notes 128–30.

166. J. Res. 5, 1973 Wis. Sess. Laws 1132 (rejected by voters Apr. 1973); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 238.

167. J. Res. 29, 1981 Wis. Sess. Laws 1698 (approved by voters Nov. 1982); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 239. In 1995, voters defeated a proposed amendment eliminating additional masculine references in the constitution; the amendment's defeat may have been due to the fact that it was coupled with an unpopular sports lottery amendment. J. Res. 12, 1995 Wis. Sess. Laws 2503 (rejected by voters Apr. 1995); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 240.

168. See J. Res. 2, 1993 Wis. Sess. Laws 1832 (approved by voters Apr. 1993); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 240.

169. Compare J. Res. 21, 1997 Wis. Sess. Laws 2332 (approved by voters Nov. 1998), and 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 240, with U.S. CONST. amend. II.

170. See Rasmussen & Collins, *supra* note 143.

extensive debate, state voters decided in 1987 to effectively gut constitutional prohibitions on gambling by permitting a lottery and pari-mutuel betting, and gambling has rapidly become a fixture of the Wisconsin social scene.¹⁷¹ The 1874 amendment limiting municipal debt to five percent of assessed property value,¹⁷² though arguably the most important amendment of the nineteenth century, was an isolated case: with two exceptions,¹⁷³ voters made no further important constitutional changes to municipal powers until the 1960s. Between 1960 and 1972, voters, in a series of amendments, created Wisconsin's modern county government system;¹⁷⁴ since 1960, they have also made changes to constitutional debt and financing provisions to allow municipalities to fully perform the functions assigned to them in the late twentieth century.¹⁷⁵

At first blush, it is surprising that municipal powers amendments were not more frequent before 1960. Municipalities have always played a vital role in carrying out governmental functions in Wisconsin, and the legislature has enacted a steady stream of laws affecting municipalities throughout the state's history.¹⁷⁶ The most likely explanation is that once the issue of municipal debt for internal improvements was constitutionally resolved, statutory change was sufficient to accommodate the growth of municipal powers for the next fifty years. The 1924 home rule amendment reflected the fact that by the 1920s the role of municipal, as well as state, government had grown sufficiently that formal delegation of some legislative power to municipalities was necessary, but that it was not necessary to regulate the details of local

171. See *supra* text accompanying notes 132–35.

172. Act of Feb. 18, 1874, ch. 37, 1874 Wis. Sess. Laws 43 (approved by voters Nov. 1874); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235.

173. Act of July 13, 1921, ch. 566, 1921 Wis. Sess. Laws 937 (authorizing additional debt for utility acquisition) (rejected by voters Nov. 1922); Act of June 4, 1923, ch. 203, 1923 Wis. Sess. Law 380 (authorizing local home rule) (approved by voters Nov. 1924); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 236.

174. J. Res. 64, 1961 Wis. Sess. Laws 727 (county executive terms) (approved by voters Nov. 1962); J. Res. 2, 1969 Wis. Sess. Laws 1515 (county government) (approved by voters Apr. 1969); J. Res. 13, 1971 Wis. Sess. Laws 1319 (county government systems) (approved by voters Apr. 1972); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 237–38.

175. See 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 237–40.

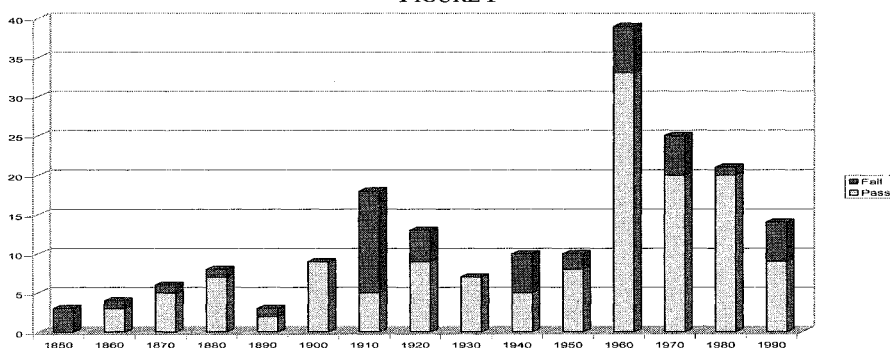
176. See RANNEY, *supra* note 7, at 125–30. See generally WIS. STATS. chs. 59–68 (2004–2005) (addressing, among other things, the government and management of municipalities, including towns, villages, and cities; county and civil service; municipal budget systems).

administration at the constitutional level.¹⁷⁷ The wave of municipal amendments after 1960 reflected, in part, the need to give constitutional sanction to county government and, in part, the need to adjust constitutional debt and financing limits.¹⁷⁸

The rise in amendments pertaining to state debt and taxation since 1960 has a similar underpinning. The transition after 1848 from an agricultural to a commercial and industrial economy and changes in population has required regular revisions to Wisconsin's tax system; constitutional amendments have been required in several cases because of the constitution's uniform taxation clause.¹⁷⁹ But lawmakers have tried to confine change to the statutory level as much as possible, and for the most part they have succeeded. The only amendments of importance needed before 1960 were the 1908 amendment authorizing an income tax¹⁸⁰ and the 1927 amendment authorizing taxation for the forestry program.¹⁸¹ Most tax-related amendments since 1960 have been primarily technical in nature; relatively few have been controversial, but they have been necessary because of the breadth of the uniformity clause.

B. Rates of Amendment Proposal and Passage

FIGURE 1¹⁸²



177. See Act of June 4, 1923, ch. 203, 1923 Wis. Sess. Laws 380 (approved by voters Nov. 1924); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 236; RANNEY, *supra* note 7, at 381–88.

178. See *supra* text accompanying notes 119–22.

179. WIS. CONST. art. VIII, § 1; see RANNEY, *supra* note 7, at 289–312.

180. Act of July 16, 1907, ch. 661, 1907 Wis. Sess. Laws 1253 (approved by voters Nov. 1908); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235.

181. J. Res. 13, 1927 Wis. Sess. Laws 972 (approved by voters Apr. 1927); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 236.

182. The data used to construct this figure are taken from the 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235–40.

Several things stand out when one examines the number of constitutional amendments proposed over time and the number of amendments approved by Wisconsin voters. The flow of proposed amendments was modest in the nineteenth century and, with the exception of the Progressive era, remained so until 1960. While the number of proposed amendments rose temporarily during the Progressive era, the number of amendments approved remained roughly the same as in the nineteenth century: as previously noted, voters rejected a large group of proposed Progressive amendments at the 1914 election.¹⁸³ That election marked the end of the Progressive era and dashed Progressives' hopes of transforming the balance of powers within Wisconsin government through the initiative, referendum, and recall processes,¹⁸⁴ as well as their hopes for a broad state-sponsored insurance system.¹⁸⁵ The Progressives' effort to use constitutional amendments to further their reform program was largely a failure, but it did not matter. Despite the program's many controversial and far-reaching features, most of its core elements did not require constitutional changes: they were created by statute.¹⁸⁶

The number of proposed amendments rose dramatically in the 1960s and remained relatively high through the 1980s.¹⁸⁷ Amendments during this period were not the product of a single social or economic movement: they covered numerous areas including the bill of rights, suffrage, the organization and powers of each branch of government and of local government, taxation and state debt, and gambling.¹⁸⁸ The rise was due to several factors. The social upheavals of the 1950s and 1960s and the reaction thereto account for a number of amendments such as the gender equality and neutrality amendments of the 1970s and 1980s, as well as the more recent crime victim and arms amendments and the

183. See *id.*; see also *supra* text accompanying notes 78–82.

184. See Act of Aug. 7, 1913, ch. 770, 1913 Wis. Sess. Laws 1209 (rejected by the voters Nov. 1914); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 236; see also *supra* text accompanying notes 80–83.

185. See ch. 770, 1913 Wis. Sess. Laws 1209; 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 236;

186. The number of amendments proposed and amendment rejection rates during the 1920–1960 period were unremarkable, except for a sudden burst of voter resistance in the 1940s: four of the ten amendments proposed during that decade were rejected and an amendment to allow state spending for veterans housing passed only narrowly. 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 237.

187. See Table 1 and accompanying text *supra* Part II.B; see Figure 1 and accompanying text *infra* Part III.B.

188. See Table 2 and accompanying text *supra* Part III.A; Table 3 and accompanying text *supra* Part III.A.

“defense of marriage” amendment.¹⁸⁹ The relaxation of attitudes toward gambling in the 1950s and 1960s, part of a larger social trend to redefine basic rights and the pursuit of happiness in individual rather than societal terms, contributed to the wave of amendments that transformed gambling in Wisconsin.¹⁹⁰ Perhaps most important, many amendments have been necessary to reconfigure portions of the constitution still largely geared to the nineteenth century—most notably the internal improvements clause and the uniform taxation clause.¹⁹¹

The post-1960 tide of amendments may be receding: the 1990s and the first six years of the twenty-first century have witnessed the lowest number of proposed amendments and the highest amendment rejection rate of any period since 1960.¹⁹² However, an unusually high proportion of the amendments passed in the 1990s involved controversial social issues, including modification of the governor’s partial veto power (1990),¹⁹³ the crime victims amendment (1993),¹⁹⁴ and the arms amendment (1998).¹⁹⁵ Relatively few technical amendments necessary to accommodate the constitution to economic and technological changes were enacted in the 1990s, but it is unlikely that the need for technical amendments has come to an end in Wisconsin. Whether the period since 1990 is simply a temporary aberration in a continuing era of frequent amendment or the beginning of a new era of restraint remains to be seen.

IV. CONCLUSION

As noted at the beginning of this Article, Wisconsin’s constitution has lived a long and relatively healthy life compared to most American state constitutions. But does this mean that the constitution has been a success and should be continued? The history of Wisconsin’s

189. See RANNEY, *supra* note 7, at 645; *supra* text accompanying notes 133–46.

190. See *supra* text accompanying notes 131–39; LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* 2–3, 29–35 (1990).

191. See *supra* text accompanying notes 101–09 (discussing amendments expanding state powers to promote public welfare); *supra* text accompanying notes 98–99 (discussing amendments expanding analogous municipal powers).

192. 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 240; see Figure 1 and accompanying text *supra* Part III.B.

193. J. Res. 39, 1989 Wis. Sess. Laws 1793 (approved by voters Apr. 1990); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 239.

194. J. Res. 2, 1993 Wis. Sess. Laws 1832 (approved by voters Apr. 1993); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 240.

195. J. Res. 21, 1997 Wis. Sess. Laws 2332 (approved by voters Nov. 1998); 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 240.

constitutional amendments provides two useful approaches to this question. First, it provides insights as to why Wisconsin has not felt it necessary to enact new constitutions or to amend its original constitution beyond recognition. Second, the patterns of amendment and of amendment rejection over the course of the state's history provide clues as to what parts of the constitution might usefully be changed by reformers and what parts are better left alone.

The relative stability of Wisconsin's constitution is due mainly to the caution of the state's founders—ironically, a caution bred out of the 1846 convention's overenthusiasm for enshrining social reforms in the constitution—and to the fact that Wisconsin has not endured as many social and legal upheavals as some states, most notably the Southern states during and after the Civil War.¹⁹⁶ The 1847–1848 convention did not eschew all social reform, but it was careful to leave the most controversial topics of the day to the legislature's discretion, either by maintaining silence in the constitution or by inserting general directives to the legislature to pass “wholesome” laws on such subjects.¹⁹⁷ Banking, homestead exemptions, and married women's property laws all received attention from the legislature and underwent substantial change during the last half of the nineteenth century.¹⁹⁸ If Wisconsin had been forced to deal with such changes through constitutional amendment rather than statutes, at a minimum, the state's rate of amendment would have been much higher than it was, and it is quite possible that at some point voters would have decided the mass of changes needed was so large that the best way to deal with the problem was enactment of a new constitution. The wisdom of the founders' constitutional caution was confirmed during the Progressive era: the Progressive reform program, which thoroughly reshaped Wisconsin government and fully ushered Wisconsin into the regulatory age, was accomplished almost exclusively by statute and generated no calls for a new constitution.¹⁹⁹ In 1914, when Progressives sought to extend their reform of government to include lawmaking by initiative and referendum, voters firmly signaled that they did not want the Progressive revolution to rise to constitutional status.²⁰⁰

196. ERIC S. FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877*, at 330–33 (1988).

197. See *supra* text accompanying notes 31–32.

198. See RANNEY, *supra* note 7, at 72–73, 204–10.

199. See *supra* text accompanying notes 62–84.

200. See *supra* text accompanying notes 79 and 83.

The 1847–1848 convention inserted some details in the constitution which later became controversial and required amendment. In hindsight, some of these clearly should have been omitted. For example, if the founders had left the matter of official salaries to the legislature (as was finally done in the 1920s),²⁰¹ a string of proposed amendments and amendment rejections in the late nineteenth century could have been avoided. If the tenure of sheriffs and other local officials had been left to the legislature, another string of amendments and rejections, this one stretching well into the twentieth century, also could have been avoided.²⁰² But one cannot fault Wisconsin's founders too much: such details were found in many state constitutions in the mid-nineteenth century, the product of a time when government was less complex and delegation of functions was considerably less of a necessity than it is now.²⁰³

Other provisions that later necessitated amendment perhaps could not have been avoided, most notably the internal improvements clause and the uniform taxation clause. As early as 1859, Justice Cole, a member of the 1847–1848 convention, openly regretted that the constitution's ban on state subsidy of internal improvements had not been expanded to cover municipal subsidies as well. Another option would have been to omit the clause altogether and leave subsidy issues to the legislature. But the issue of internal improvement subsidies, although thorny, was of vital importance to all American states in the mid-nineteenth century.²⁰⁴ Legislative efforts in other states that had addressed subsidy issues without constitutional guidance had often brought disaster,²⁰⁵ and the 1847–1848 Wisconsin convention would have faced severe criticism if it had not addressed the issue in some manner. The fact that even after many years of wrestling with its own subsidy-related crisis Wisconsin chose to limit rather than eliminate municipal subsidies indicates that Cole's preference for a simple solution, namely a ban on all subsidies, was not shared by his constituents.²⁰⁶ As to taxation, in 1848 the bulk of Wisconsin's wealth lay in its land and uniform taxation was therefore a simple matter. Tax uniformity was

201. Act of June 6, 1925, ch. 413, 1925 Wis. Sess. Laws 605 (governors' salary) (approved by voters Nov. 1926); J. Res. 57, 1927 Wis. Sess. Laws 994 (legislators' salary) (first consideration); J. Res. 6, 1929 Wis. Sess. Laws 1065 (approved by voters Apr. 1929).

202. See *supra* text accompanying notes 86–88.

203. See *supra* text accompanying notes 39–43, 86–88.

204. See *supra* text accompanying notes 22–23, 45–54.

205. See *supra* text accompanying notes 45–46.

206. See *supra* text accompanying note 53.

considered a central component of broader American ideals of equality and was deemed a matter of constitutional stature by many states.²⁰⁷ Only extraordinary foresight would have enabled the 1847–1848 convention to anticipate the new types of wealth the industrial revolution would create and the problems such change would cause the tax system.²⁰⁸ Even so, most of the problems that arose were eventually handled by statute.²⁰⁹

The patterns of accepted and rejected amendments that have developed over time provide useful lessons to Wisconsinites who may wish to enact a new constitution or systematically overhaul the present document. Reformers should look first to housekeeping provisions in the constitution. Some, such as salary provisions, have been eliminated,²¹⁰ but some remain.²¹¹ Before proceeding, reformers should also draw a careful line between housekeeping and non-housekeeping measures. The matter of local officials' terms of office is a case in point: in light of the legislature's plenary power over local governments and the amount of constitutional controversy the issue of sheriffs' terms of office has generated,²¹² the prospect of leaving the issue to the legislature is attractive, but the ideal of localized control of government runs deep and the amount of controversy this subject has generated suggests it may be important enough to retain constitutional status.

Several substantive matters also commend themselves to reformers' attention. Consideration should be given to eliminating the internal improvements clause. The nineteenth century economic conditions that gave rise to the clause have long since disappeared. Arguably the clause has been more of a nuisance than a useful check on government expansion: amendments have repeatedly been needed to implement policies for which there was clear popular consensus simply because the improvements clause stood in the way.²¹³ It seems likely that the political process and common-law limits on expansion of social

207. See RANNEY, *supra* note 7, at 290–94; see also 2 BENJAMIN PERLEY POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 2098 (1878) (compiling American state constitutions; as of 1877 nearly all state constitutions contained a uniform taxation clause).

208. See RANNEY, *supra* note 7, at 290–309.

209. *Id.*

210. See *supra* text accompanying note 85.

211. See, e.g., WIS. CONST. arts. IV, § 25 (setting forth procedures for state printing and stationery contracts), XI, § 4 (authorizing state to enact general banking laws), XIII, § 11 (prohibiting donation of free passes and franking privileges to candidates for office).

212. See *supra* text accompanying notes 86–88.

213. See *supra* text accompanying notes 91–97 and 100–08.

programs, particularly the public purpose doctrine, will be adequate checks on unwarranted expansion in the future. Likewise, a strong case can be made that the uniform taxation clause has become more of a nuisance than a fundamental principle²¹⁴ and that any future concerns about discriminatory taxation could be addressed through general equal protection principles.²¹⁵

Reformers—and Wisconsinites generally—should also carefully consider whether the recent increase in amendments incorporating controversial social policies is good for the state.²¹⁶ Realistically, such amendments can never be completely eliminated from constitutions: many measures seen as controversial in one era come to be considered fundamental rights in another era, and it is difficult to predict which changes in social values are mere fads and which will last. But in this author's view, public opinion on matters such as gambling, domestic relations, and the definition of marriage²¹⁷ has been changed often enough over the course of Wisconsin's history that such matters are not appropriate for inclusion in the constitution. The legislature is best equipped to adjust the law in such areas to the ebb and flow of public opinion.

Probably the best means of alleviating this problem is to make it more difficult to amend the Wisconsin Constitution. As in other states, Wisconsin's requirement that two consecutive legislatures pass an amendment does not appear to have been an effective device for filtering out marginal amendments,²¹⁸ but increasing the majority vote requirement to a greater proportion (perhaps two-thirds) for legislative passage, for voter ratification, or for both likely would reduce the number of amendments. If the founders had required a two-thirds vote for ratification, only 57 of Wisconsin's 145 amendments would have passed.²¹⁹ Reformers should consider enacting such a measure in order to honor the founders' intent that "fundamental changes [be] placed

214. See *supra* text accompanying notes 96–107.

215. U.S. CONST. amend. XIV; WIS. CONST. art. I, § 1; see also, e.g., Wisconsin Prof'l Police Ass'n v. Lightbourn, 2001 WI 59, ¶¶ 221–23, 243 Wis. 2d 512, ¶¶ 221–23, 627 N.W.2d 807, ¶¶ 221–23 (setting forth the test for determining when legislative classifications are permissible under state and federal equal protection clauses).

216. See *supra* text accompanying notes 137–46.

217. See *supra* text accompanying notes 132–46.

218. Lutz, *supra* note 3, at 30–31.

219. See 2005–2006 WISCONSIN BLUE BOOK, *supra* note 5, at 235–40.

beyond the reach of any sudden ebullition of feeling, prompted by whatever motive.”²²⁰

That being said, it must also be said that Wisconsin’s constitutional system has, in the main, been successful. The reforms discussed above would likely be useful, but it is far from certain that a new constitution is the best way to achieve them. Even if a new constitution were enacted, the only certainty is that a new series of amendments will unfold as the twenty-first century brings to Wisconsin changes that no one can now foretell.

220. See selections from the *Prairie du Chien PATRIOT*, *supra* note 36.